

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Sep 19, 2022

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHRISTOPHER LEE C.,¹

Plaintiff,

v.

KILOLO KIJAKAZI,
COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

No: 1:21-cv-03095-LRS

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 12, 17. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney Jeffrey Schwab. Defendant is represented by Special Assistant United States Attorney Lars J. Nelson. The Court, having reviewed the administrative record and the parties' briefing, is fully

¹ The court identifies a plaintiff in a social security case only by the first name and last initial in order to protect privacy. *See* LCivR 5.2(c).

1 informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 12, is
2 denied and Defendant's Motion, ECF No. 17, is granted.

3 JURISDICTION

4 Plaintiff Christopher Lee Clyburn (Plaintiff), filed for disability insurance
5 benefits (DIB) on January 12, 2019, alleging an onset date of February 28, 2017,
6 which was amended to August 1, 2017, at the hearing. Tr. 37, 160-68. Benefits
7 were denied initially, Tr. 96-98, and upon reconsideration, Tr. 100-02. Plaintiff
8 appeared at a hearing before an administrative law judge (ALJ) on November 12,
9 2020. Tr. 34-68. On November 20, 2020, the ALJ issued an unfavorable decision,
10 Tr. 13-33, and on June 2, 2021, the Appeals Council denied review. Tr. 1-6. The
11 matter is now before this Court pursuant to 42 U.S.C. § 405(g).

12 BACKGROUND

13 The facts of the case are set forth in the administrative hearings and
14 transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and
15 are therefore only summarized here.

16 Plaintiff was born in 1968 and was 52 years old at the time of the hearing. Tr.
17 36-37. He last job was performing maintenance for rental units. Tr. 43. He has
18 work experience as automotive service advisor and automotive service technician.
19 Tr. 45-48. Plaintiff testified that he initially hurt his left knee in junior high school
20 and has had multiple instances of re-injury. Tr. 38. He testified that he has severe
21 pain and stiffness in his knee and that he is limited in his ability to stand for any

1 period of time or walk very far. Tr. 38. When he sits for very long, it stiffens up
2 and becomes difficult to stand. Tr. 38. Surgery is not available unless he loses
3 weight. Tr. 39. He has used a cane on and off for years but had been using it daily
4 in the five to six months before the hearing. Tr. 39.

5 Plaintiff testified he also has problems with his right hand and wrist. Tr. 49.
6 When he squeezes things, his hand cramps and becomes painful. Tr. 49. He cannot
7 carry much more than 15 pounds. Tr. 49. He cannot type at a computer for long
8 without cramping. Tr. 50. Carpal tunnel release surgery is an option, but he is
9 terrified of surgery. Tr. 49.

10 STANDARD OF REVIEW

11 A district court's review of a final decision of the Commissioner of Social
12 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
13 limited; the Commissioner's decision will be disturbed "only if it is not supported by
14 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158
15 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable
16 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and
17 citation omitted). Stated differently, substantial evidence equates to "more than a
18 mere scintilla[,] but less than a preponderance." *Id.* (quotation and citation omitted).
19 In determining whether the standard has been satisfied, a reviewing court must
20 consider the entire record as a whole rather than searching for supporting evidence in
21 isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156
3 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
4 rational interpretation, [the court] must uphold the ALJ’s findings if they are
5 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
6 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an ALJ’s
7 decision on account of an error that is harmless.” *Id.* An error is harmless “where it
8 is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
9 (quotation and citation omitted). The party appealing the ALJ’s decision generally
10 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
11 396, 409-10 (2009).

12 FIVE-STEP EVALUATION PROCESS

13 A claimant must satisfy two conditions to be considered “disabled” within the
14 meaning of the Social Security Act. First, the claimant must be “unable to engage in
15 any substantial gainful activity by reason of any medically determinable physical or
16 mental impairment which can be expected to result in death or which has lasted or
17 can be expected to last for a continuous period of not less than twelve months.” 42
18 U.S.C. §§ 423(d)(1)(A). Second, the claimant’s impairment must be “of such
19 severity that he is not only unable to do his previous work[,], but cannot, considering
20 his age, education, and work experience, engage in any other kind of substantial
21 gainful work which exists in the national economy.” 42 U.S.C. § 423(d)(2)(A).

1 The Commissioner has established a five-step sequential analysis to determine
2 whether a claimant satisfies the above criteria. *See* 20 C.F.R. § 404.1520(a)(4)(i)-
3 (v). At step one, the Commissioner considers the claimant’s work activity. 20
4 C.F.R. § 404.1520(a)(4)(i). If the claimant is engaged in “substantial gainful
5 activity,” the Commissioner must find that the claimant is not disabled. 20 C.F.R. §
6 404.1520(b).

7 If the claimant is not engaged in substantial gainful activity, the analysis
8 proceeds to step two. At this step, the Commissioner considers the severity of the
9 claimant’s impairment. 20 C.F.R. § 404.1520(a)(4)(ii). If the claimant suffers from
10 “any impairment or combination of impairments which significantly limits [his or
11 her] physical or mental ability to do basic work activities,” the analysis proceeds to
12 step three. 20 C.F.R. § 404.1520(c). If the claimant’s impairment does not satisfy
13 this severity threshold, however, the Commissioner must find that the claimant is not
14 disabled. 20 C.F.R. § 404.1520(c).

15 At step three, the Commissioner compares the claimant’s impairment to
16 severe impairments recognized by the Commissioner to be so severe as to preclude a
17 person from engaging in substantial gainful activity. 20 C.F.R. §
18 404.1520(a)(4)(iii). If the impairment is as severe or more severe than one of the
19 enumerated impairments, the Commissioner must find the claimant disabled and
20 award benefits. 20 C.F.R. § 404.1520(d).

1 If the severity of the claimant's impairment does not meet or exceed the
2 severity of the enumerated impairments, the Commissioner must assess the
3 claimant's "residual functional capacity." Residual functional capacity (RFC),
4 defined generally as the claimant's ability to perform physical and mental work
5 activities on a sustained basis despite his or her limitations, 20 C.F.R. §
6 404.1545(a)(1), is relevant to both the fourth and fifth steps of the analysis.

7 At step four, the Commissioner considers whether, in view of the claimant's
8 RFC, the claimant is capable of performing work that he or she has performed in the
9 past (past relevant work). 20 C.F.R. § 404.1520(a)(4)(iv). If the claimant is capable
10 of performing past relevant work, the Commissioner must find that the claimant is
11 not disabled. 20 C.F.R. § 404.1520(f). If the claimant is incapable of performing
12 such work, the analysis proceeds to step five.

13 At step five, the Commissioner should conclude whether, in view of the
14 claimant's RFC, the claimant is capable of performing other work in the national
15 economy. 20 C.F.R. § 404.1520(a)(4)(v). In making this determination, the
16 Commissioner must also consider vocational factors such as the claimant's age,
17 education and past work experience. 20 C.F.R. § 404.1520(a)(4)(v). If the claimant
18 is capable of adjusting to other work, the Commissioner must find that the claimant
19 is not disabled. 20 C.F.R. § 404.1520(g)(1). If the claimant is not capable of
20 adjusting to other work, analysis concludes with a finding that the claimant is
21 disabled and is therefore entitled to benefits. 20 C.F.R. § 404.1520(g)(1).

1 The claimant bears the burden of proof at steps one through four above.
2 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
3 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
4 capable of performing other work; and (2) such work “exists in significant numbers
5 in the national economy.” 20 C.F.R. § 404.1560(c)(2); *Beltran v. Astrue*, 700 F.3d
6 386, 389 (9th Cir. 2012).

7 **ALJ’S FINDINGS**

8 At step one, the ALJ found Plaintiff did not engage in substantial gainful
9 activity since August 1, 2017, the alleged onset date. Tr. 18. At step two, the ALJ
10 found that Plaintiff has the following severe impairments: obesity, left-knee
11 degenerative joint disease; and carpal tunnel syndrome in the right upper extremity.
12 Tr. 18. At step three, the ALJ found that Plaintiff does not have an impairment or
13 combination of impairments that meets or medically equals the severity of a listed
14 impairment. Tr. 19.

15 The ALJ then found that Plaintiff has the residual functional capacity to
16 perform light work with the following additional limitations:

17 he can stand and walk for two hours out of an eight-hour day and sit
18 for six hours; he can push and pull frequently with the left lower
19 extremity; with his dominant right upper extremity, he can perform
20 frequent gross handling and feeling; he can perform occasional
postural activities except that he can frequently stoop and can never
climb ladders, ropes, or scaffolds; he must avoid concentrated
exposure to hazards.

21 Tr. 20.

1 At step four, the ALJ found that Plaintiff is unable to perform any past
2 relevant work. Tr. 26. At step five, after considering the testimony of a vocational
3 expert and Plaintiff's age, education, work experience, and residual functional
4 capacity, the ALJ found there are jobs that exist in significant numbers in the
5 national economy that Plaintiff can perform such as electrical accessories assembler,
6 bench assembler, or storage facility rental clerk. Tr. 28. Thus, the ALJ concluded
7 that Plaintiff has not been under a disability, as defined in the Social Security Act,
8 from August 1, 2017, through the date of the decision. Tr. 28.

9 ISSUES

10 Plaintiff seeks judicial review of the Commissioner's final decision denying
11 disability income benefits under Title II of the Social Security Act. ECF No. 16.
12 Plaintiff raises the following issues for review:

- 13 1. Whether the ALJ properly considered the Listings at step three; and
- 14 2. Whether the ALJ made a legally sufficient step five finding.

15 ECF No. 12.

16 DISCUSSION

17 A. Step Three

18 Plaintiff contends the ALJ failed to properly consider Listing 1.02 for major
19 dysfunction of a joint. ECF No. 12 at 6-14. At step three of the evaluation process,
20 the ALJ must determine whether a claimant has an impairment or combination of
21 impairments that meets or equals an impairment contained in the Listings. *See* 20

1 C.F.R. § 404.1520(d). The Listings describe “each of the major body systems
2 impairments [considered] to be severe enough to prevent an individual from doing
3 any gainful activity, regardless of his or her age, education, or work experience.” 20
4 C.F.R. § 404.1525. “Listed impairments are purposefully set at a high level of
5 severity because ‘the listings were designed to operate as a presumption of disability
6 that makes further inquiry unnecessary.’” *Kennedy v. Colvin*, 738 F.3d 1172, 1176
7 (9th Cir. 2013) (quoting *Sullivan v. Zebley*, 493 U.S. 521, 532 (1990)). “Listed
8 impairments set such strict standards because they automatically end the five-step
9 inquiry, before residual functional capacity is even considered.” *Kennedy*, 738 F.3d
10 at 1176. If a claimant meets the listed criteria for disability, he will be found to be
11 disabled. 20 C.F.R. § 404.1520(a)(4)(iii).

12 An impairment “meets” a listing if it meets all of the specified medical
13 criteria. *Sullivan*, 493 U.S. at 530; *Tackett*, 180 F.3d at 1098. An impairment that
14 manifests only some of the criteria, no matter how severely, does not qualify.
15 *Sullivan*, 493 U.S. at 530; *Tackett*, 180 F.3d at 1099. An unlisted impairment or
16 combination of impairments “equals” a listed impairment if medical findings equal
17 in severity to all of the criteria for the one most similar listed impairment are present.
18 *Sullivan*, 493 U.S. at 531; *see* 20 C.F.R. § 404.1526(b).

19 “If a claimant suffers from multiple impairments and none of them
20 individually meets or equals a listed impairment, the collective symptoms, signs and
21 laboratory findings of all of the claimant’s impairments will be evaluated to

determine whether they meet or equal the characteristics of any relevant listed impairment.” *Tackett*, 180 F.3d at 1099. However, “[m]edical equivalence must be based on medical findings,” and “[a] generalized assertion of functional problems is not enough to establish disability at step three.” 20 C.F.R. § 404.1526(a). The claimant bears the burden of establishing an impairment (or combination of impairments) meets or equals the criteria of a listed impairment. *Burch v. Barnhart*, 400 F.3d 676, 683 (9th Cir. 2005).

Plaintiff contends his left knee and wrist impairments equal Listing 1.02 for major dysfunction of a joint. ECF No. 12 at 7. Listing 1.02² describes major dysfunction of a joint as an impairment which is:

Characterized by gross anatomical deformity (e.g., subluxation, contracture, bony or fibrous ankylosis, instability) and chronic joint pain and stiffness with signs of limitation of motion or other abnormal motion of the affected joint(s), and findings on appropriate medically acceptable imaging of joint space narrowing, bony destruction, or ankylosis of the affected joint(s). With:

A. Involvement of one major peripheral weight-bearing joint (i.e., hip, knee, or ankle), resulting in inability to ambulate effectively, as defined in 1.00B2b;

or

B. Involvement of one major peripheral joint in each upper extremity (i.e., shoulder, elbow, or wrist-hand), resulting in inability to perform fine and gross movements effectively, as defined in 1.00B2c.

² Listing 1.02 was removed and replaced with Listing 1.18 effective April 2, 2021.

20 C.F.R. § Pt. 404, Subpt. P, App. 1 (April 2, 2021). The Court considers the Listing in effect at the time of the ALJ’s decision.

1 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 1.02.

2 An inability to ambulate effectively means “an extreme limitation of the
3 ability to walk,” which is an impairment that “interferes very seriously” with the
4 ability to independently initiate, sustain, or complete activities. “Ineffective
5 ambulation is defined generally as having insufficient lower extremity functioning []
6 to permit independent ambulation without the use of a hand-held assistive device(s)
7 that limits the functioning of both upper extremities.” 20 C.F.R. Pt. 404, Subpt. P,
8 App. 1 § 1.00B2b(1). The Listing further provides:

9 To ambulate effectively, individuals must be capable of sustaining a
reasonable walking pace over a sufficient distance to be able to carry
10 out activities of daily living. They must have the ability to travel
without companion assistance to and from a place of employment or
11 school. Therefore, examples of ineffective ambulation include, but
are not limited to, the inability to walk without the use of a walker,
12 two crutches or two canes, the inability to walk a block at a reasonable
pace on rough or uneven surfaces, the inability to use standard public
13 transportation, the inability to carry out routine ambulatory activities,
such as shopping and banking, and the inability to climb a few steps at
14 a reasonable pace with the use of a single hand rail. The ability to
walk independently about one’s home without the use of assistive
15 devices does not, in and of itself, constitute effective ambulation.

16 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 1.00B2b(2).

17 The ALJ found that Plaintiff’s wrist and knee impairments do not meet Listing
18 1.02, individually or in combination. Tr. 19. The ALJ noted his impairments do not
19
20
21

1 render him incapable of effective gross or fine movements,³ and do not render him
2 incapable of effective ambulation. Tr. 19.

3 Plaintiff's argument is that he meets all elements of Listing 1.02 based on his
4 knee condition, except that he does not use "a hand-held assistive device(s) that
5 limits the functioning of both upper extremities." 20 C.F.R. Pt. 404, Subpt. P, App. 1
6 § 1.00B2b(1); ECF No. 12 at 7-11. He argues, however, that symptoms of bilateral
7 carpal tunnel syndrome "implicate[] the kind of limited use of his bilateral
8 extremities that would satisfy an equaling of Listing 1.02A." ECF No. 12 at 11. In
9 other words, Plaintiff argues that carpal tunnel syndrome creates limitations
10 equivalent to the use of a hand-held assistive device such as a walker, limiting the
11 functioning of both upper extremities. Accordingly, Plaintiff's argument is
12 essentially that he experiences an inability to ambulate effectively due to the
13 combination of his knee condition and carpal tunnel syndrome.

14 First, as Defendant observes, "[a]n ALJ is not required to discuss the
15 combined effects of a claimant's impairments or compare them to any listing in an
16 equivalency determination, unless the claimant presents evidence in an effort to
17 establish equivalence." *Burch*, 400 F.3d at 683. An ALJ does not have an obligation

18 ³ Plaintiff does not contend he is unable to perform fine and gross movements
19 effectively under Listing 1.02B so the court's analysis is limited to the ability to
20 ambulate effectively under listing 1.02A.
21

1 to discuss medical equivalency *sua sponte* and does not err by failing to do so when
2 the issue was not argued or explained at the hearing. *See Ford v. Saul*, 950 F.3d
3 1141, 1157 (9th Cir. 2020). In this case, the issue of equivalency was not raised,
4 argued, explained, or mentioned at the hearing, and Plaintiff's theory that symptoms
5 of carpal tunnel syndrome combined with his knee impairment result in an inability
6 to ambulate effectively is raised for the first time at summary judgment. Thus, the
7 ALJ did not err by failing to specifically discuss equivalency in the decision.

8 Second, the ALJ's finding that Plaintiff is not incapable of effective
9 ambulation is supported by substantial evidence. Tr. 19. For instance, the ALJ
10 noted that during a consultative examination in April 2019, William Drenguis, M.D.,
11 found Plaintiff had an antalgic gait and difficulty rising from a chair with his arms
12 crossed, but could rise on his own by pushing off with his hands and could ambulate
13 independently. Tr. 19, 346-51. The ALJ also noted findings of normal gait and
14 station by orthopedic providers. Tr. 19, 285 (August 2018), 376 (November 2019).

15 During a June 2018 office visit to check Plaintiff's hypertension, he had no
16 other complaints, and on exam demonstrated normal range of motion and strength
17 with no tenderness or swelling. Tr. 22, 313. In August 2018, Plaintiff reported he
18 had over a year of improvement in his knee after a prior corticosteroid injection and
19 sought another. Tr. 22, 285-86. In April 2019, he reported having injuries from
20 sledding and slipping on ice over the winter that had healed but said he was still
21 limited. Tr. 22, 357. On exam, he had normal range of motion and strength with no

1 tenderness or swelling. Tr. 22, 357. There were similar findings in October 2019,
2 although Plaintiff felt very limited by chronic knee pain, stated he needed to lose
3 weight to get knee surgery, and found it difficult to exercise due to his knee. Tr. 22,
4 378.

5 The following month, in November 2019, Plaintiff reported to the orthopedist
6 that he had at least a couple of months of relief from steroid injections in the past
7 year. Tr. 22, 375. He complained of aching pain, discomfort at night, and episodic
8 swelling, catching, and grinding in his left knee. Tr. 22, 375. On exam, there was
9 some tenderness, but no obvious swelling, ecchymosis, or deformity; he had active
10 motion for full extension to 120 degrees of flexion; no pain with hyperextension or
11 overpressure of flexion; the knee was stable to stress tests; sensations were intact;
12 and he had good distal pulses. Tr. 22, 375. At a January 2020 podiatry
13 appointment, the provider noted findings such as normal alignment of the knees,
14 normal and symmetrical reflexes in the lower extremities, and normal sensation in
15 the lower extremities. Tr. 384. The ALJ concluded that Plaintiff's symptoms were
16 worse in June 2017 than they were after his August 2017 alleged onset date, and that
17 after his initial orthopedic consultation and corticosteroid injection, he presented
18 with more normal gait and range of motion and milder complaints. Tr. 22. While he
19 did continue to have limitations, he did not show marked limitations in mobility or
20 strength. Tr. 22. All of these findings are reasonable and constitute substantial
21 evidence supporting the step three finding.

1 Plaintiff cites records regarding his gait and use of a cane in support of his
2 argument that his ambulation is impaired. ECF No. 12 at 10-11. It is noted that the
3 issue is not, as Plaintiff indicates, “whether the impairment has risen to such a
4 degree that it impairs ambulation?” ECF No. 12 at 10. The issue is whether there is
5 an “*inability* to ambulate effectively.” 20 C.F.R. Pt. 404, Subpt. P, App. 1 § 1.02A.

6 Plaintiff cites two records preceding the alleged onset date indicating “slightly
7 antalgic gait” and “very mild guarded antalgic” gait, ECF No. 12 at 10 (citing Tr.
8 267, 290), which may be evidence of impairment, but do not constitute evidence of
9 an inability to ambulate. Plaintiff also cites a June 2017 record which indicates the
10 treating PA discussed treatment options, including among them use of a cane. Tr.
11 288. However, no cane was prescribed, and Plaintiff pursued other options. Tr. 288.
12 Plaintiff also cites his own reports of using a cane and that his carpal tunnel is worse
13 when using his cane, ECF No. 12 at 10 (citing Tr. 39, 205, 347, 350), but the ALJ
14 found Plaintiff’s statements about his limitations not consistent with the record. Tr.
15 21; *infra*.

16 Plaintiff also cites a finding by Steven Drenguis, M.D., of markedly antalgic
17 gait favoring the left side. ECF No. 12 at 10 (citing Tr. 349). Notably, the ALJ
18 observed a discrepancy because the next day, Plaintiff’s primary care provider
19 recorded exam findings of “normal range of motion and strength, no tenderness or
20 swelling,” and made no notation regarding gait. Tr. 24, 357-58. The ALJ found that
21 this and discrepancies with orthopedic findings of generally normal ambulation and

1 a wider range of knee motion suggest Dr. Drenquis' findings reflect either a transient
2 exacerbation or some magnification of symptoms by Plaintiff. Tr. 24. The evidence
3 cited by Plaintiff is insufficient to demonstrate the extreme limitation in the ability to
4 ambulate effectively required by Listing 1.02A. *See, e.g., Jessop v. Colvin*, No.
5 2:15-cv-000388-EJF, 2016 WL 4074144 (D. Utah July 29, 2016) (despite evidence
6 of difficulty ambulating including a "mildly antalgic gait," sometimes using a cane,
7 and using an electric wheelchair for shopping, "difficulty ambulating does not
8 equate with an inability to ambulate effectively."); *Kennedy*, 738 F.3d at 1176
9 ("Listed impairments are purposefully set at a high level of severity because 'the
10 listings were designed to operate as a presumption of disability that makes further
11 inquiry unnecessary.'").

12 With respect to Plaintiff's carpal tunnel syndrome, the ALJ found that
13 Plaintiff does not have a listing-level hand impairment. Tr. 19. The ALJ noted that
14 Dr. Drenquis found mildly diminished 4+/5 right grip strength and normal 5/5 left
15 grip strength. Tr. 19, 348. Plaintiff's strength was normal 5/5 throughout his
16 extremities, and Dr. Drenquis assessed no limitations on fine or gross manipulative
17 activities except a limitation to occasional for handle, finger, and feel with the right
18 upper extremity. Tr. 19, 350. The ALJ also found Plaintiff's minimal treatment and
19 follow up for carpal tunnel syndrome is inconsistent with marked limitations in
20 using his hands. Tr. 23. These findings are supported by substantial evidence.
21

1 Lastly, Plaintiff contends his testimony about his complaints should be
2 credited. ECF No. 12 at 14. An ALJ engages in a two-step analysis to determine
3 whether a claimant's testimony regarding subjective pain or symptoms is credible.
4 "First, the ALJ must determine whether there is objective medical evidence of an
5 underlying impairment which could reasonably be expected to produce the pain or
6 other symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks
7 omitted). Second, "[i]f the claimant meets the first test and there is no evidence of
8 malingering, the ALJ can only reject the claimant's testimony about the severity of
9 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
10 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
11 citations and quotations omitted). Plaintiff asserts there is no evidence that his
12 complaints are not supported, ECF No. 12 at 14, but does not address the reasons
13 given by the ALJ for finding Plaintiff's symptom claims are not entirely consistent
14 with the record.

15 First, the ALJ found Plaintiff's knee problems improved with treatment. Tr.
16 22-23; *see supra*. The effectiveness of treatment is a relevant factor in determining
17 the severity of a claimant's symptoms. 20 C.F.R. § 404.1529(c)(3). Second, the
18 ALJ noted inconsistencies between Dr. Drenguis's exam findings and exam
19 findings by a different provider the next day. *See supra*. The ALJ evaluates a
20 claimant's statements for their consistency, both internally and with other
21 information in the case record. S.S.R. 16-3p. Third, the ALJ found the record

contains evidence of activities inconsistent with Plaintiff's allegations. Tr. 24. It is reasonable for an ALJ to consider a claimant's activities which undermine claims of totally disabling pain when evaluating symptom claims. *See Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir. 2001). Plaintiff reported activities such as daily cleaning and laundry, cooking with breaks, performing minor household repairs, working part-time in maintenance and/or automotive service, and going sledding, which the ALJ found indicate Plaintiff has retained the ability to perform manipulative activities for part of a day or at intervals, and a greater capacity for standing and walking than alleged. Tr. 24, 44, 54, 201, 275, 347, 357. None of these findings are specifically challenged by Plaintiff, ECF No. 12 at 14, and the court concludes they are supported by substantial evidence.

B. Step Five

Plaintiff asserts the ALJ failed to conduct a proper step five analysis because the finding that there are jobs available that Plaintiff can perform was based on an incomplete RFC and hypothetical. ECF No. 12 at 14-16. The ALJ's hypothetical must be based on medical assumptions supported by substantial evidence in the record which reflect all of a claimant's limitations. *Osenbrook v. Apfel*, 240 F.3d 1157, 1165 (9th Cir. 2001). The hypothetical should be "accurate, detailed, and supported by the medical record." *Tackett*, 180 F.3d at 1101. The ALJ is not bound to accept as true the restrictions presented in a hypothetical question propounded by a claimant's counsel. *Osenbrook*, 240 F.3d at 1164; *Magallanes v. Bowen*, 881 F.2d

1 747, 756-57 (9th Cir. 1989); *Martinez v. Heckler*, 807 F.2d 771, 773 (9th Cir. 1986).
2 The ALJ is free to accept or reject these restrictions as long as they are supported by
3 substantial evidence, even when there is conflicting medical evidence. *Magallanes*,
4 881 F.2d at *id.*

5 *1. Jeffrey Ventre, M.D.*

6 Plaintiff argues the ALJ should have included “observations and limitations”
7 from Dr. Ventre in the RFC and hypothetical. An ALJ must consider and evaluate
8 the persuasiveness of all medical opinions or prior administrative medical findings
9 from medical sources. 20 C.F.R. § 404.1520c. A medical opinion is a statement
10 from a medical source about what a claimant can still do despite his impairments and
11 whether the claimant has one or more impairment-related limitations or restrictions
12 in various functional areas. 20 C.F.R. § 404.1513(a)(2). Dr. Ventre saw Plaintiff in
13 July 2015 for a psychiatric consultation and electrodiagnostic testing regarding pain
14 in his right arm and elbow. Tr. 275. The ALJ considered Dr. Ventre’s treatment
15 notes in evaluating Plaintiff’s carpal tunnel syndrome, Tr. 23, 275, but did not
16 otherwise assign weight or include findings from Dr. Ventre’s treatment notes in the
17 RFC or hypothetical.

18 Plaintiff cites the “History of Present Illness” section of Dr. Ventre’s notes
19 which indicate that Plaintiff’s symptoms range from two to nine out of ten; that
20 repetitive motions, twisting the wrist, and arm hammering can make symptoms
21 worse; and that he experiences weakness in his arm and grip. ECF No. 12 at 15

1 (citing Tr. 275). As Defendant observes, the statements cited by Plaintiff are his
2 own symptom statements recorded by Dr. Ventre in his treatment notes. ECF No.
3 17 at 14. Treatment notes, in general, do not constitute medical opinions. *See* 20
4 C.F.R. § 404.1513(a). The Ninth Circuit has found no error in ALJ decisions that do
5 not weigh statements within medical records when those records do not reflect
6 physical or mental limitations or otherwise provide information about the ability to
7 work. *See, e.g., Turner v. Comm’r of Soc. Sec.*, 613 F.3d 1217, 1223 (9th Cir. 2010)
8 (recognizing that when a physician’s report did not assign any specific limitations or
9 opinions regarding the claimant’s ability to work, “the ALJ did not need to provide
10 ‘clear and convincing reasons’ for rejecting [the] report because the ALJ did not
11 reject any of [the report’s] conclusions.”). Based on the foregoing, the ALJ did not
12 err with respect to Dr. Ventre’s opinion.

13 2. *Steven Drenguis, M.D.*

14 Dr. Drenguis examined Plaintiff in April 2019 and diagnosed bilateral
15 degenerative joint disease of the knees, left much worse than the right, and right
16 hand carpal tunnel syndrome. Tr. 346-51. He opined that Plaintiff can stand and
17 walk less than two hours in an eight-hour workday; sit at least six hours in an eight-
18 hour workday; maximum lifting and carrying capacity is 20 pounds occasionally and
19 10 pounds frequently; may occasionally climb or stoop and should never balance,
20 kneel, crouch, or crawl; right upper extremity has no limits on reaching but may only
21

1 occasionally handle, finger, and feel; left upper extremity has no limits on reaching,
2 handling, fingering, or feeling. Tr. 350.

3 For claims filed after March 27, 2017, the ALJ must consider and evaluate the
4 persuasiveness of all medical opinions or prior administrative medical findings from
5 medical sources. 20 C.F.R. § 404.1520c(a) and (b). Supportability and consistency
6 are the most important factors in evaluating the persuasiveness of medical opinions
7 and prior administrative findings, and therefore the ALJ is required to explain how
8 both factors were considered. 20 C.F.R. § 404.1520c(b)(2). The ALJ may, but is
9 not required, to explain how other factors were considered. 20 C.F.R. §
10 404.1520c(b)(2); *see* 20 C.F.R. § 404.1520c(c)(1)-(5).

11 The ALJ found Dr. Drenguis' opinion is not entirely persuasive. Tr. 25. The
12 ALJ concluded that while Dr. Drenguis' opinion has some support from exam
13 findings and Plaintiff's history, the limitations assessed are not entirely consistent
14 with the record overall. Tr. 25. With respect to standing and walking limitations
15 and postural limitations, the ALJ determined that Dr. Drenguis' limitations are
16 inconsistent with findings from other providers. *See* 20 C.F.R. § 404.1520c(b)(2).
17 For example, the ALJ noted findings such as generally normal gait, milder
18 limitations in knee movement, generally normal appearing movement and strength,
19 and only intermittent findings of knee swelling, and Plaintiff's reported
20 improvement with corticosteroid injections. Tr. 25; *supra*.

1 With respect to right hand limitations, the ALJ determined Dr. Drenguis'
2 assessment of a limitation to occasional handling, fingering, and feeling with the
3 right hand is not supported by exam findings or consistent with the record. 20
4 C.F.R. § 404.1520c(b)(2). The ALJ noted Dr. Drenguis found some decreased
5 sensation and mild reduction in right grip strength but observed Plaintiff performed
6 both fine and gross manipulative activities without difficulty and has normal range
7 of motion in the wrist. Tr. 25, 348-50. The ALJ concluded that Dr. Drenguis must
8 have relied on Plaintiff's report of difficulty with repetitive motions and use of tools.
9 Tr. 25, 347. A doctor's opinion may be discounted if it relies on a claimant's
10 unreliable self-report. *Tommasetti v. Astrue*, 533 F.3d 1035, 1041 (9th Cir. 2008);
11 *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005).

12 The ALJ also pointed out that Plaintiff did not seek treatment beyond a night
13 brace provided in 2018 and engaged in activities like cooking, cleaning, and repairs
14 which require handling, fingering, and feeling with his right hand. Tr. 26; *supra*.
15 Additionally, the ALJ observed there is little evidence of difficulty with fine
16 fingering and that Plaintiff's allegations primarily involve repetitive tasks and grip
17 activities involving gross handling such as tools. Thus, the ALJ reasonably found
18 that Plaintiff can perform frequent gross handling and feeling and has no limitation
19 on fingering. Tr. 20, 26.

20 Plaintiff does not address the reasons given by the ALJ for finding Dr.
21 Drenguis' opinion only partially persuasive. ECF No. 12 at 15. Instead, Plaintiff

1 argues the opinion is consistent with the record and should be credited. ECF No. 12
2 at 16. The existence of a legally supportable alternative resolution of the evidence
3 does not provide a sufficient basis for reversing an ALJ's decision that is supported
4 by substantial evidence. *Sprague v. Bowen*, 812 F.2d 1226, 1229 (9th Cir.1987).
5 Here, the ALJ's findings regarding Dr. Drenguis' opinion are based on the record
6 and involve reasonable inferences from the evidence. The ALJ's reasoning is
7 explained with specificity and is supported by substantial evidence.

8 Thus, the limitations included in the RFC and hypothetical to the vocational
9 expert reflect those restrictions credited by the ALJ. As noted *supra*, the ALJ is free
10 to accept or reject restrictions as long as they are supported by substantial evidence,
11 even when there is conflicting medical evidence. *Magallanes*, 881 F.2d at *id.* The
12 ALJ's reliance on testimony the VE gave in response to the hypothetical was
13 therefore proper and there is no error. *See id.*; *Bayliss*, 427 F. 3d at 1217-18.

14 CONCLUSION

15 Having reviewed the record and the ALJ's findings, this Court concludes the
16 ALJ's decision is supported by substantial evidence and free of harmful legal error.

17 Accordingly,

18 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.

19 2. Defendant's Motion for Summary Judgment, **ECF No. 17**, is

20 **GRANTED**.

1 **IT IS SO ORDERED.** The District Court Clerk is directed to enter this
2 Order and provide copies to counsel. Judgment shall be entered for Defendant and
3 the file shall be **CLOSED**.

4 **DATED** September 19, 2022.

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6 

LONI Y. R. SUKO
Senior United States District Judge